

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE BIOGEN IDEC INC. SECURITIES
LITIGATION,

)
)
) Civil Action No. 05-10400-RCL
)
)

**THE LONDON PENSIONS FUND AUTHORITY'S AND
NATIONAL ELEVATOR INDUSTRY PENSION FUND'S
MOTION TO SUPPLEMENT THE RECORD IN SUPPORT OF
THEIR OBJECTION TO THE ORDER OF THE MAGISTRATE JUDGE
APPOINTING LEAD PLAINTIFF AND LEAD COUNSEL**

Institutional Investors The London Pensions Fund Authority and National Elevator Industry Pension Fund ("London Pensions Fund/National Elevator") hereby move this Court for leave to supplement the record in support of their Objection (the "Objection") to the Order of the Magistrate Judge Appointing Lead Plaintiff and Lead Counsel in order to submit the Transcript of Motion Hearing Before The Honorable Marianne B. Bowler United States Magistrate Judge Held on September 23, 2005 (the "Transcript"). As reasons therefore, London Pensions Fund/National Elevator state that the Transcript was not available at the time they filed their Objection. London Pensions Fund/National Elevator's counsel have conferred with counsel of record for the other parties and they do not object to this motion.

A copy of the Transcript is attached hereto as Exhibit A.

DATED: December 12, 2005

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1(A)(2)

I hereby certify that the parties' counsel have conferred in a good faith effort to narrow or resolve the issues raised in this motion. Counsel of record for all other parties do not object to this motion.

/s/Theodore M. Hess-Mahan
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 05-10400-RCL

CHARLES BROWN, et al
Plaintiffs

v.

BIOGEN IDEC INC., et al
Defendants

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MARIANNE B. BOWLER
UNITED STATES MAGISTRATE JUDGE
HELD ON SEPTEMBER 23, 2005

APPEARANCES:

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P R O C E E D I N G S

(Court called into session)

THE CLERK: Today is Friday, September 23, 2004. The case of Charles Brown v. Biogen Idec Incorporated, et al, Civil Action No. 05-10400 will now be heard before this Court. Will counsel please identify themselves for the record.

MR. RUDMAN: Good morning, your Honor, Samuel Rudman from Lerach Coughlin Stoia Geller Rudman & Robbins for the London Pension Authority and the National Elevator Pension Fund.

THE COURT: Thank you.

MR. ROSENFELD: David Rosenfeld from Lerach Coughlin on behalf of the same plaintiffs.

THE COURT: Thank you.

MR. HESS-MAHAN: Good morning, your Honor, Ted Hess-Mahan from Shapiro Haber & Urmey also on behalf of the same plaintiffs.

MR. CAPPUCCI: Good morning, your Honor, Vincent Cappucci, Entwistle & Cappucci for the Biogen Institutional Investor Group.

THE COURT: Thank you.

MR. DUMAIN: Good morning, your Honor, Sanford Dumain for the same plaintiffs.

MR. WEISS: Good morning, your Honor, Richard Weiss from Milberg, Weiss, Bershad & Schulmann for the same

1 plaintiffs.

2 MS. GANS: Nancy Freeman Gans, Moulton & Gans for the
3 same plaintiffs.

4 MR. MATULE: Your Honor, I don't know if the rest of
5 the plaintiffs' counsel is going to identify themselves but--

6 THE COURT: Might as well get credit.

7 MR. MATULE: Yes. Well, I happen to represent Biogen
8 Idec Inc., James Mullen and William Rastetter. It's Matthew
9 Matule from Skadden Arps in Boston on behalf of those
10 defendants and with me from my office is Michael Hines..

11 THE COURT: Thank you.

12 All right. Well, we're here for the remaining
13 portions of docket entries number 17 and 22 for the appointment
14 of lead counsel, and I'll hear the moving party.

15 MR. RUDMAN: Good morning, your Honor. This hearing
16 is a continuation of the lead plaintiff hearing we had before
17 this Court several months ago, and as the Court will recall at
18 the hearing the issue was which moving group was going to be
19 appointed lead plaintiff. There were two key issues at that
20 hearing. One was which moving group represented the largest
21 financial interest, and the other was we had contended that the
22 Biogen Institutional Investor Group had overstated its losses
23 and was inadequate and atypical primarily because two of its
24 members, Third Millennium and Horatio Capital, were options
25 traders and they had only reported to the Court their stock

1 trades.

2 We argued at that hearing that the Court could not be
3 confident that the loss figures that had been reported by Third
4 Millennium and Horatio as part of the Biogen Institutional
5 Investors Group's losses were accurate because we believed that
6 since they were options traders there were profits associated
7 with options trades and that their overall true economic
8 interest and any recovery in this suit was reduced by profits
9 they had in options trading. We further argued at that hearing
10 that an options trade for a sophisticated options trader like
11 Third Millennium and Horatio engages in unique options trading
12 strategies that take it far a field from the ordinary investor
13 rendering it atypical and not satisfying Rule 23.

14 The response at that hearing, your Honor, from the
15 Biogen Institutional Investor Group was to contend that Third
16 Millennium and Horatio were simply sophisticated institutional
17 investors who had traded Biogen common stock like other
18 investors, and that any options trading was minimal or
19 relatively de minimus when compared to the stock trading.
20 Following that hearing as the Court is aware the Court issued
21 an order ordering discovery, and then the order stated that we
22 should be providing, gave the presumption to the Biogen
23 Institutional Investor Group based on their representations as
24 to their financial interests and provided that our clients
25 could take discovery of the Biogen Institutional Investor Group

1 to check out the options trading and determine if they were
2 adequate and typical. And as I looked over the hearing
3 transcript and looked over the correspondence on this, you
4 know, our motion papers to the Court it was clear that what was
5 envisioned was that Third Millennium and Horatio would give us
6 all of the their options trading or any securities trading that
7 related to their trading in Biogen and Idec and that they would
8 make available for deposition, after we received that make
9 available for deposition the traders so that we could discuss
10 with them the trading strategies that were employed. In
11 addition, we also asked for any trading manuals or procedures
12 or policies relating to those trading strategies.

13 I looked back at my brief where we requested and I
14 looked back at the hearing transcript and it was plain on its
15 face we made clear to the Court what we wanted and we thought
16 the Court's order was very clear as to what should be produced.
17 Also in that order the Court laid down a very tight schedule
18 for the next hearing, basically giving us eight days, eight or
19 nine days if my memory serves me correctly to complete that
20 discovery. Quite frankly, Judge, I couldn't make it eight or
21 nine days later. I understand that Mr. Cappucci couldn't. And
22 we came to an agreement amongst counsel to postpone the hearing
23 until the beginning of September, which actually comported with
24 a vacation, a long scheduled vacation schedule that I had.
25 However, immediately after receiving your order we promptly

1 produced a letter requesting all the things we had said we
2 wanted at the hearing and in our prior papers, just give us
3 your options trading, tell us if there's any other securities
4 trading that's related to Biogen Idec, tell us who the traders
5 are, let's depose them, let's find out what the facts are and
6 let's argue the facts as to what these, whether or not these
7 individuals, whether or not these entities' financial interests
8 is what they claim and whether or not they're adequate and
9 typical. Let's get the facts out and have a fair discussion.
10 We can disagree on what those facts mean but at least we'll
11 have all the facts. Three weeks of emails and letters and I
12 didn't receive any of the documents. Now, just so we're clear,
13 this is a sophisticated institutional investor that clears its
14 trade through a sophisticated clearing firm, when getting
15 options data or options traded is as simple as turning around
16 and pushing a button on your computer and asking a search to be
17 performed and a machine should spit out pages. I mean getting
18 the brokerage records that show these trades should be as
19 simple since they're a regulated entity and registered with the
20 NASD as turning around to a file cabinet, taking a bunch of
21 brokerage statements out of a file cabinet, photocopying them
22 and sending them to me. Instead what happened is that I
23 received a letter attaching 26 pages of documents, 24 of which
24 relates solely to common stock trade and indicate they were
25 printed April 26, 2005, which is prior to when the lead

1 plaintiff's motions were made. Two of the pages relate to the
2 taking on of a singles options position by Third Millennium.
3 Now, I say I received these pages. I received them the night I
4 left for my vacation, which counsel for the Biogen
5 Institutional Investor Group knew about. Although my associate
6 did tell me what was in the papers, I didn't react to any of
7 the assertions in the Biogen Institutional Group's cover letter
8 covering the documents, their assertions that the trading does
9 not evidence some atypical trading model or that this is a
10 fishing expedition and they've produced to us all the
11 documents. Instead, your Honor, when I got back from vacation
12 I prepared a motion, the motion that's before you today because
13 we believe at that point in time there was additional options
14 trades that hadn't been disclosed, and that even after court
15 ordered discovery we still did not have all of the documents.
16 As is required by this court's local rules, after preparing my
17 motion I also called the defendants or communicated with them
18 and called counsel for the Biogen Institutional Investor Group
19 and advised them of my motion. I was going to be seeking
20 permission of the court to serve a subpoena on their clearing
21 agent to make sure I had all of the trades. I wanted the names
22 of the traders at Horatio and Third Millennium. I wanted to
23 take depositions. I thought it was clear the last time we were
24 before you that we were entitled to that. I wanted an explicit
25 court order requiring them to appear so there would be no

1 ambiguity as to that fact, and I also wanted the deposition of
2 Neil Kazaross. You'll remember that on their prior papers Mr.
3 Kazaross, who's a principal of Third Millennium, submitted a
4 declaration stating that although they did trade options they
5 only made \$500,000 during their options trading during the
6 class period and since they only had given me one slip of paper
7 with one trade on it, I believe that called into question all
8 the representations Mr. Kazaross had made in his declaration
9 and believe that in order to clarify those matters I wanted the
10 deposition of Mr. Kazaross, and we filed those papers. We
11 filed those papers shortly before we were supposed to appear
12 before this Court on September 12th. Primarily the timing was
13 related, Judge, to a contention by the Biogen Institutional
14 Investor Group, one, my vacation, two, the Biogen Institutional
15 Investor Group's contention that we had agreed between
16 ourselves to extend discovery until the day of the September
17 12th hearing. And so any motion that I hadn't received
18 discovery prior to that in essence would have been premature
19 because I hadn't given them the full amount of time to produce
20 the documents putting aside the fact that I wasn't in any way
21 going to be able to take anyone's deposition prior to getting
22 all of the documents.

23 The response to my motion was that we should adjourn
24 - after much discussion we agreed that it would be useful to
25 the Court that we adjourn the hearing before you to give them

1 an opportunity to respond to my papers. We didn't think it
2 was useful to appear before your Honor the next day after I
3 filed the motion only to have counsel for Biogen Institutional
4 Investor Group say we need to respond to those papers or for
5 the Court to say I would like to hear what they have to say
6 before I make any decision about that. So I agree that I
7 thought was an appropriate rationale for adjourning that
8 hearing. That was on September 11th or 12th or the weekend
9 shortly before that. Then we received what I guess were
10 conflicting orders as to what or some confusion as to when the
11 hearing would be set down for. I originally received a
12 communication it was going to be October 24th. Then I received
13 something it was going to be September 23rd.

14 THE COURT: Well, because we're dealing with a period
15 here that was a statutory period. I want to get it done.

16 MR. RUDMAN: I appreciate that, your Honor. And the
17 response to that was that last Friday I received a call from
18 counsel for the Biogen Institutional Investor Group saying we
19 have located more options trades. This is Friday at 4:00, this
20 past Friday, a week ago today. We've located more options
21 trades. We're going to send them to you either later today or
22 Monday, and probably Monday, and we will make available Noel
23 Smith, who I had never heard his name before, for deposition
24 4:00 on Tuesday in Chicago. Now, one, I wasn't going to be -
25 in my, based on that call I didn't believe I was going to be

1 receiving the documents until Monday morning. Two, I have the
2 documents here I'm going to show them to you. I think you'll
3 see it's extensive options trading. It's hundreds of or not
4 hundreds but tens and tens of trades and it's exceedingly
5 complex. To believe that, and I had to have a professor of
6 finance who's nationally known review it for two and a half,
7 three days to piece together what happened. To expect us to be
8 able to take a deposition on that compact of timeframe I
9 believe is unreasonable and unfair. So for them to contend
10 that I somehow waived because they made some witness available
11 to me at some point in time without giving me the information
12 in a timely manner I think is ridiculous.

13 Now that is basically a snapshot of what took place
14 in discovery. I understand that they could have a different
15 view of what took place in discovery but as to when we received
16 documents or information there simply can't be any dispute.
17 And, your Honor, to add insult to injury, when we did get the
18 documents last Friday the options trading for Horatio indicates
19 that it was printed by the clearing agent August 16, 2005, more
20 than a month ago, the very day Mr. Cappucci sent me the letter
21 telling me this was the extent of the documents that they had.
22 So if I'm somewhat skeptical of the fact that I received all
23 the options trades even though the counsel at this table are
24 close friends of mine and I have litigated with them in the
25 past--

1 THE COURT: Why the delay if you had it August 16th?

2 MR. CAPPUCCI: Your Honor, I do not believe that that
3 is what the record accurately reflects, and I will respond to
4 the suggestions of Mr. Rudman. I want to assure the Court that
5 we moved in good faith throughout this process and proffered
6 our witness for deposition on two occasions. But I would, if
7 the Court would permit me to respond to this after he finishes
8 I think I can--

9 THE COURT: Well, I'm asking right now. Why if you
10 had it in hand on August 16th--

11 MR. CAPPUCCI: We didn't have all the -- we did not
12 have all the data. Mr. Rudman pressed for a much fuller
13 breadth of data. In the interim, we received his motion
14 seeking to serve a subpoena on our firms clearing agent and
15 what we were attempting to do during this process in late
16 August was to ensure that we had done everything we possibly
17 could to get him a full record of transactions and not just one
18 options contract but a multitude or series of options which
19 trade related to the common stock. This was not such a
20 simplistic exercise as reflected by Mr. Rudman. We went to the
21 clearing firm by whom he sought to serve a subpoena on to save
22 the Court the time to deal with that, and, of course, we know
23 that right now he has not withdrawn his request for a subpoena
24 on Pax notwithstanding the fact, your Honor, that in the record
25 as of today is a letter from Pax, the clearing firm, saying

1 that we've given him anything. He's known about this issue
2 for months.

3 THE COURT: Anything or everything?

4 MR. CAPPUCCI: Everything. They have given him,
5 given us and we've given him everything. There was a cover
6 letter to that effect. He's known about this options issue for
7 months. He's litigated this issue before in other cases. This
8 is not a surprise. We proffered the witness on two separate
9 occasions. Noel Smith is here in court today. I don't see
10 anyone from the London Pension Fund Authority in court and they
11 haven't been here yet in this case. All right. The fact of
12 the matter is he had an opportunity to depose the witness to
13 make as much progress as he wanted and he could have taken the
14 position at that time, your Honor, I took his deposition, I
15 asked questions, I pressed the witness, I didn't get enough and
16 sure enough at the eleventh hour they pressed me for - they
17 produced all this additional documentation. That's not what he
18 did. Congress envisioned a quick process. This was not open
19 ended. It was not extended. Your Honor gave us a week and a
20 half to do this. So it was a compressed timeframe to begin
21 with. He could have made progress with that deposition. He
22 elected not to. He elected not to proceed with that to develop
23 a factual record. That should be held against him and our
24 position is that they've waived. But to say that there has
25 been no good faith on this side of the table, your Honor, is

1 absolutely not true.

2 THE COURT: Okay.

3 MR. RUDMAN: All right, your Honor, I want to hand up
4 the additional trades. Look, I'm not going to get into a he
5 said, she said with Mr. Cappucci. I think it's self evident,
6 you know, getting trading records from a brokerage firm is a
7 five-minute exercise not a month and a half.

8 MR. CAPPUCCI: Your Honor, just for the record here,
9 we're not a brokerage firm by the way. I just want it clear on
10 the record.

11 MR. RUDMAN: Well, a sophisticated options trading
12 firm.

13 MR. CAPPUCCI: I object to that language in
14 characterization as well.

15 MR. RUDMAN: That's how they describe themselves on
16 their website, your Honor. Now options data is complex and
17 it's hard to figure out. The first two pages of the very fine
18 type--

19 THE COURT: Which document?

20 MR. RUDMAN: That one.

21 THE COURT: This document?

22 MR. RUDMAN: Yeah. The one in your right hand would
23 be Third Millennium's trading and the other one would be
24 Horatio's trading. If you look at the top of the page on
25 Horatio that was the day I was referring to, August 16, 2005.

1 THE COURT: Yeah, I see that, 8/16.

2 MR. RUDMAN: Okay. The Third Millennium page, I, to
3 me simply looks like a spreadsheet that was - maybe Mr. Smith
4 can tell us about this if he's going to say anything today
5 which I'm not sure if that would be proper, that looks like a
6 spreadsheet that was prepared by Third Millennium. When my
7 expert looked at that he said there isn't any way any firm
8 that's trading keeps their records that way. The trades are
9 all jumbled up. They appear to be put in a manner designed to
10 confuse us. All I can say is it took a long time to straighten
11 that trade out. The pages with the small print, the Third
12 Millennium trades, we couldn't - originally the documents came
13 to us by fax. We couldn't read them. We had to get a clean
14 copy from them which they gave to us this past Monday. Now
15 what we - you know, this information answers a big question
16 that we had from the beginning of this proceeding, which was
17 our contention that they had engaged in extensive options
18 trading and their contention that the options trading hadn't
19 been extensive. Here's the facts, the options trading was
20 extensive. And I can tell you, your Honor, when we had our
21 expert look at it, it was also exceedingly complicated
22 strategies that they engaged in. So that's the first thing,
23 there's extensive options trading.

24 What is the second piece of information? Well, we
25 told your Honor the first time that we believed they made money

1 off of trading options. We've had our expert take a look at
2 it. I've put together - I'm going to describe their trading a
3 little bit more in a minute, but I do want to hand you a sheet
4 which we shared all of this with them prior to the hearing.
5 They would frequently pair trades on a given day as you can see
6 from this sheet. They would buy a call and sell a call--

7 MR. CAPPUCCI: Just for the record, your Honor, we
8 received this at midnight last night. I just want to make the
9 record clear.

10 MR. RUDMAN: Do you want to give him the email, Stan,
11 from yesterday morning when we sent it to him? They'd buy a
12 call, sell a call and what we did here was just pair up a bunch
13 of different trades where we could actually tell or surmise
14 what took place. If an options position, for example, there
15 were some calls that they had sold that we know based on how
16 the stock price reacted they expired or wouldn't have been
17 exercised, and we came up with a figure as to how much that
18 would reduce their losses.

19 Now, admittedly there's some assumptions in here
20 about what happened but, and there was other trading that they
21 did during the class period, but we can't tell whether that was
22 at a profit or a loss because they haven't given us their
23 records. We don't have their brokerage records. But based on
24 what they gave us it looks to us like Third Millennium picked
25 up almost a million and a half in options trading profits and

1 that Horatio did 90,000 and that would take the numbers down
2 to 3.4 million below the London Elevator.

3 Now, I recognize they have a chart that shows 300,000
4 in losses but for the life of me, and that chart I received
5 from their expert yesterday, for the life of me I can't figure
6 out and maybe Mr. Cappucci will explain it, how they - that
7 chart seems to be divorced from economic reality. And I think
8 after he explains it, I'd like the opportunity to respond to
9 whatever it is he says. But I think this makes clear what we
10 spoke about at our first hearing which was the losses aren't as
11 they seem.

12 Now that's what you would expect because this was an
13 options trading firm and they're not in the business of trading
14 common stock and trying to and taking loan positions. They're
15 in the business of hedging positions with various securities,
16 mitigating the risk and trying to make money up front for
17 taking a risk in a position, and that's what they did here and
18 that's why they're inadequate and atypical. Now, we had our
19 expert take a look at one trade on one given day and I want to
20 explain to the Court this is for Third Millennium and then I'm
21 going to do Horatio, the trading strategy.

22 Your Honor, these are a set of trades from Third
23 Millennium on January 27, 2005. I've made a graphical
24 representation that our expert prepared that show you the
25 payouts.

1 THE COURT: I mean, are these things you want marked
2 as exhibits for this hearing? They're not in the papers.

3 MR. RUDMAN: Certainly then, your Honor. I guess we
4 would mark the--

5 THE COURT: Okay. So let's - why don't you read them
6 into the record and--

7 MR. RUDMAN: Well, let's mark the--

8 THE COURT: Let me give you this packet right here.

9 MR. RUDMAN: Okay.

10 THE COURT: Read them into the record in the order in
11 which you want, giving them to the clerk, and I will assign
12 them a number as we go. Madam clerk, could you pass them back?
13 (Pause)

14 MR. RUDMAN: Okay. I'm going to mark as report
15 London Exhibit No. 1, Third Millennium's options trades.
16 Should I give you the bates numbers, your Honor, or is that
17 sufficient?

18 THE COURT: No, just give me the document.

19 MR. RUDMAN: Here.

20 THE COURT: And then--

21 MR. RUDMAN: Okay, we'll mark this as--

22 THE COURT: -- that will be marked as Exhibit, London
23 Exhibit No. 1. That way the record is clear.

24 (London Exhibit No. 1, admitted)

25 MR. RUDMAN: Thank you, your Honor. Then we have

1 Horatio Capital's options trades which could be London Exhibit
2 No. 2.

3 THE COURT: All right, shall be marked London Exhibit
4 No. 2 for the purpose of this hearing.

5 (London Exhibit No. 2, admitted)

6 MR. RUDMAN: Then we have our calculation of the
7 reduction in their financial interests.

8 THE COURT: Shall be marked London Exhibit No. 3 for
9 the purpose of this hearing.

10 (London Exhibit No. 3, admitted)

11 MR. RUDMAN: Then we have a chart, Third Millennium's
12 trades on January 27, 2005.

13 THE COURT: Will be marked London Exhibit No. 4 for
14 the purpose of this hearing.

15 (London Exhibit No. 4, admitted)

16 MR. RUDMAN: And we have a payout profile for their
17 trades on January 27, 2005.

18 THE COURT: Which will be marked as London Exhibit
19 No. 5 for the purpose of this hearing.

20 (London Exhibit No. 5, admitted)

21 (Pause)

22 MR. RUDMAN: Okay, your Honor. Thank you very much.

23 THE COURT: So we have a total of five exhibits made
24 part of the record.

25 MR. RUDMAN: I will have a couple more. You want me

1 just to mark--

2 THE COURT: No, as we go.

3 MR. RUDMAN: As we go, okay, that's fine. Okay, what
4 we did, your Honor, we tried as best we could to understand
5 their trading based on the day that they gave us and the time
6 we had to digest it. Like I said, I had an expert review it.
7 I don't have a declaration or an affidavit from him. I could
8 get one if the Court wants. I hope the Court will accept my
9 representation this is a nationally known finance professor
10 that writes books on finance and options trading.

11 THE COURT: By name?

12 MR. RUDMAN: His name is Frank Partnoy at the
13 University of San Diego. Exhibit No. 4 is Third Millennium's
14 trades on January 27, 2005 which I handed up to the Court. And
15 Exhibit No. 5 is a graphical representation of that trade.
16 Okay.

17 Our expert tells us this five-part trade, which is
18 the buy of a purchase of stock as you can see on Exhibit number
19 4. There's a purchase of stock, a buy of a call, a buy of put,
20 a sell of a call and a sell of a put, and I am going to assume
21 that unless the Court would like me to, would you like me to
22 explain--

23 THE COURT: No, you can give me credit for that
24 amount.

25 MR. RUDMAN: Okay. Thank you, your Honor.

1 THE COURT: I do read the business section of the
2 Times everyday so.

3 MR. RUDMAN: On that day these were the five trades
4 they did. My expert tells me that's called, this is called
5 options arbitrage. They're setting up a position to capture
6 what they believe are disparities in the relative prices of
7 options, and they're hedging the position with the purchase of
8 common stock. Okay? Now if you look at the payout profiles
9 you can see exactly how this position would have played out for
10 them as they're sitting at their computer screens on January
11 27, 2005. The line down the middle is the share price and that
12 was, remember they bought 21,000 shares, \$64 a share. The
13 yellow line is the long put. That is they bought 500 contracts
14 to put the stock to somebody at \$60 a share. Okay?

15 THE COURT: Yep.

16 MR. RUDMAN: And that line shows what's going to
17 happen in the future. By the way that was with a March '05
18 expiration. That's key, Judge, because you remember the end of
19 the class period is February 25th. That's when the stock goes
20 from 68 to 30 something. Okay? So that contract is going to be
21 worth a lot of money when the stock goes down. That yellow
22 line shows you what's going to happen when the stock declines,
23 okay. The light blue line is a short put. They also sold a
24 put. So sold someone a right to put the stock to them at 55.
25 Okay? And that short blue line shows their downside risk as

1 the, you know, their downside exposure as the stock goes down.
2 The, I want to call it purplish line, is the long call. Okay,
3 that's on the right side of the graph and that shows the call
4 they bought, the right to buy the stock from somebody at 70 and
5 the profit they're going to make if the stock goes up. Okay?
6 And then the other orangish type line I guess, some weird
7 colors of burnt orange, going down is the short call. Okay?
8 Five different trades on one day in options arbitrage strategy.
9 All right? The dark green line is the net pay off. That's
10 what's going to happen before March 19th depending on where the
11 stock goes. The blue line is the P&L. That's the profit or
12 loss. What's the difference between the green and blue you're
13 asking yourself? The difference is the premium they took in
14 for selling the call and selling the put. That's the
15 difference. That's going to be their profit or--

16 THE COURT: So that's why they're basically parallel?

17 MR. RUDMAN: Right.

18 THE COURT: It's the margin.

19 MR. RUDMAN: Right, it's the margins they made on
20 selling those stock. But what does this tell us? This tells
21 us that on January 27th they were going to make money if the
22 stock went, you know, up a little bit or up a lot or down.

23 THE COURT: Or down.

24 MR. RUDMAN: Okay. In fact, one could say the best
25 case scenario for them on January 27th would be a decline from

1 63 to 54. So this was a bearish position, your Honor. This
2 was a bet or this was a better outcome for them if the stock
3 started to move down. Now, in all, in order to be - fully
4 explain everything I want to mark as Exhibit No. 5--

5 THE COURT: We have five.

6 MR. RUDMAN: -- Exhibit No. 6.

7 THE COURT: Six.

8 MR. RUDMAN: Sorry, I misspoke. I want to show how
9 the common stock hedged here. Okay? Why they're not like
10 another investor just in the market buying stock. Look at what
11 the purchase of the common stock did. This is London's Exhibit
12 No. 6.

13 THE COURT: Described as?

14 MR. RUDMAN: It's a pay out profile for the options
15 trades without the common stock purchased.

16 THE COURT: Marked as London Exhibit No. 6 for the
17 purpose of this hearing.

18 (London Exhibit No. 6, admitted)

19 MR. RUDMAN: Now--

20 THE COURT: Payout profile for January 27th.

21 MR. RUDMAN: Now look, comparing five and six, your
22 Honor, look at how the common stock, only net common stock was
23 a hedge to them. Look at how it takes the payoffs and the
24 potential downsides. You're looking at that blue line and that
25 green line and it kind of flattens it out a lot. All right.

1 That's because they're going to have the stock to deliver or
2 not deliver or hold if it goes up. That's why the stock is
3 there, your Honor. It's there as a hedge against this options
4 trade. They're trading options and using the stock as a hedge.
5 So what matters to them is the prices they buy the options for
6 on that day and the price of the stock. Now obviously they're
7 going to care about where the stock goes because it affects
8 their payout profile. Okay. But, your Honor, this is not a
9 typical investor in Biogen stock. The typical investor like my
10 clients who are only buying stock during the class period
11 bought stock hoping it would go up. Third Millennium bought
12 stock not really caring which way it went only hoping that
13 there wasn't some sharp directional move in the stock that
14 would have impacted them.

15 THE COURT: Okay, I have one question.

16 MR. RUDMAN: Go ahead.

17 THE COURT: In looking at Exhibits 5 and 6--

18 MR. RUDMAN: Uh-huh.

19 THE COURT: -- this is the activity for that day? I
20 mean the X axis shows dollars but what's the time span here
21 that's represented?

22 MR. RUDMAN: This is just this day.

23 THE COURT: Just this day.

24 MR. RUDMAN: And this is what's going to happen in
25 the future before those options expire--

1 THE COURT: Okay.

2 MR. RUDMAN: -- depending on what happens to the
3 price.

4 THE COURT: Okay.

5 MR. RUDMAN: And the price is along that line in the
6 middle. You know, the price is down here. The price is, you
7 know, straight across.

8 THE COURT: That's the X axis.

9 MR. RUDMAN: Right. Right. Now, I mean, this is, in
10 our expert's view this is what the people who conducted this
11 trade are looking at. Now not all of their trades during the
12 class period, you know, from what we can tell are of this five
13 piece, five component model that I'm showing you here. This
14 one I think is significant because this one comes into play on
15 the end of the class period because the stock does take a sharp
16 directional move, goes down here and they do lose some money
17 but their losses are ameliorated, you know, mitigated by this
18 hedging.

19 During the class period they had trades where there
20 were three trades or two trades. Some of the bets were a
21 little more aggressive on the bullish side. Some of the bets
22 were a little more aggressive on the bearish side. I didn't
23 think it would be necessary to go through all of their trading
24 here with you today because I think this makes my point.
25 They're not adequate and they're not typical. They're not like

1 other investors who are buying Biogen stock. When I buy a
2 stock, your Honor, I want it to go up. When they buy a stock
3 they only want to make sure that it doesn't move sharply in one
4 direction or another because their strategy is to take on some
5 risks for an up front payment of money which is what happens
6 when they buy these contracts all on January 27, 2005.
7 To go back some of these trades are listed in London Exhibit
8 No. 3. Some of them are listed there. So I submit, your
9 Honor, that when you look at the trading data for Third
10 Millennium it supports what we said when we were before you
11 previously. They're not adequate. They're not typical. And
12 if you think this took me a long time to explain, if they
13 become the, you know, if the definition of unique defense is
14 something that will distract from the prosecution of the case,
15 Mr. Matule will spend three days deposing Third Millennium in
16 their class certification deposition, and if they're lucky to
17 be certified four and a half weeks deposed, you know, taking
18 their testimony on the stand and there isn't any jury in
19 America that's going to think these kinds of sophisticated
20 options traders were defrauded by anybody. That's with respect
21 to Third Millennium.

22 Now, before I move onto what Horatio did there was
23 significant stock trading activity in the beginning of 2004.
24 We have relatively few trades, options trades for 2004, which
25 is why we continue to believe based on what we can tell from

1 their trading that when they buy stock they're using it for an
2 options position to hedge an options position. We believe that
3 we would still need to, if the Court doesn't think I've now
4 shown by enough evidence that their financial loss is
5 overstated and they're inadequate and atypical, we would still
6 need to serve a subpoena on Pax to get all of the trade. Now
7 just so we're clear that subpoena is not overly burdensome.
8 Pax is a clearing firm who gets hit with subpoenas every single
9 day. They probably have someone there that their job is only
10 to deal with responding to subpoenas, and it's simply running
11 some simple computer searches and getting the documents. So if
12 the Court wants to be, wants to go down that road, we would ask
13 that we be permitted to serve a subpoena on Pax to get what we
14 believe are, to just, to finally confirm once and for all what
15 the extent of the options trade is.

16 Now, I want to just briefly - oh, I'm reminded about
17 one point. I want to go back to London Exhibit No. 5 for a
18 minute and I want to describe - this is a tad bit of a
19 hypothesis or speculation, your Honor, but I think it's what
20 the kind of thinking you have to do when you analyze someone's
21 adequacy or typicality. When you look at five you see that,
22 London's Exhibit No. 5, you can see that if the stock declined
23 from 63 to 54 they're in the money, okay. It's a profitable
24 transaction going down. Remember the drop here is some 30
25 points. Okay. What if the expert, defendant's expert comes in

1 and says, you know, of that 30-point drop the Biotech
2 Industries were down X percent, the market was down X percent.
3 There was other prevailing market forces pushing the stock down
4 and out of that only eight or nine points of it are really
5 related. I'm not saying that's going to be the case, I'm just
6 speculating eight or nine points of that are related to the
7 withdrawal of Desabre. Okay. And that's the prevailing view.
8 They made money, okay. They're in the making money situation.
9 They're not a loser, okay, so that's a dura-type analysis of
10 why these guys would be, another reason why we believe that
11 they're inadequate or atypical.

12 Now if you go to Horatio - am I up to six?

13 UNIDENTIFIED: No, number seven.

14 MR. RUDMAN: Number seven. Your Honor, please mark
15 this as London Exhibit No. 7.

16 THE COURT: All right, it is for the record -
17 description?

18 MR. RUDMAN: Your Honor, this is called Horatio
19 calendar spread. This is just a--

20 THE COURT: All right.

21 MR. RUDMAN: -- a chart--

22 THE COURT: Being marked as London's Exhibit No. 7
23 for the purpose of this hearing.

24 (Plaintiffs Exhibit No. 7, admitted)

25 (Pause)

1 MR. RUDMAN: Your Honor, Horatio's strategy was much
2 different than Third Millennium's at least with respect to
3 Biogen Idec trading. They engaged in what we would call a
4 modified calendar spread strategy which is you buy a - what
5 they were doing were buying a very short term call and selling,
6 right - is that right?

7 UNIDENTIFIED: Yep.

8 MR. RUDMAN: Buying a very short-term call and
9 selling a call for the following month. So what you can see
10 here is they bought a call in December for a stock price of 60
11 on December 14th I believe it is, right, December 14th. The same
12 day they sold a call on that day for January. They sold them
13 in two different transactions, okay, and they picked up 50
14 grand on that transaction. All right. Now that's a bet or
15 that trader, okay, hopes the stock will go up a little bit in
16 the short term and then he hopes it goes down when it comes to
17 January so the stock doesn't get called from him and that
18 contract that he sold expires worthless. What actually, so
19 this I would submit, your Honor, again is an example of a
20 bearish position taken by Horatio unlike the regular investor
21 in Biogen who simply wanted the stock to go one way, up.

22 Now what actually happens with Horatio is a little
23 confusing for us because that call that they buy they exercise
24 and they buy the stock. Okay. So they take on a 60,000 share
25 position at the end of December '04 and take it into inventory

1 and are holding that, appear to be holding that through the
2 end of the year. When I asked our expert, well, that doesn't
3 seem to be consistent with their strategy? So we don't have
4 enough information to know what they were doing. Frequently
5 hedge funds or partnerships like this need to show a certain
6 amount of capital or equity at the end of the year. For return
7 reasons, there could be all kinds of reasons they were holding
8 the stock. So I really don't know why they bought it and held
9 it. I can only speculate those are some of the reasons why
10 they might have done it. I do know what they then went and did
11 was they sold calls against it in January and February which is
12 basically selling covered calls, a conservative strategy but
13 again I would say a somewhat bearish position on the stock
14 because you're hoping the stock doesn't go up and that call
15 expires and you simply keep your premium and keep your stock.
16 So that's Horatio.

17 I think when you wrap the whole thing together, your
18 Honor, it's pretty clear that these are inadequate and atypical
19 investors and not like the ordinary type of investors. I
20 recognize that Congress called to, made a call out to
21 institutional investors to come into these cases. And I
22 recognize they wanted that process to be done quickly, but I
23 also recognize that the PSLRA has a provision for discovery and
24 specifically says that whoever the lead plaintiff is going to
25 be must otherwise satisfy Rule 23. That has to mean something.

1 There has to be some kind of test that the Court looks at to
2 determine whether or not they comply with that. It's not a,
3 oh, well, they bought stock like everybody else so they must be
4 adequate and typical. And here, your Honor, I think that based
5 on all of the evidence we've marshaled up we certainly have
6 supported what we said to you in the beginning which is that
7 they're an options trading firm, they're inadequate and
8 atypical.

9 I don't, although we think the financial interest
10 point is interesting and we believe that they've overstated
11 their financial interests, I don't believe the Court needs to
12 even visit that today, your Honor, because your opinions
13 accorded them the presumption but gave us the opportunity to
14 rebut that presumption. I respectfully submit, your Honor,
15 even on the incomplete discovery that we've been given, the
16 fact that we weren't given adequate time with documents or time
17 to prepare a deposition, even with this limited amount of
18 evidence we've more than rebutted any presumption of adequacy
19 or typicality.

20 If the Court wants to end this process now it can do
21 so. I would respectfully submit there's more than enough
22 evidence here for you to find them inadequate and atypical.
23 You don't need to reach the financial interest point. But if
24 the Court is still not satisfied, we stand ready, willing and
25 able to serve a subpoena on Pax, take these depositions and

1 come back to your Honor in short order once again with
2 additional facts--

3 THE COURT: Short order. How much time?

4 MR. RUDMAN: We can take, I mean assuming Pax - I
5 would serve a subpoena on them. Assuming they comply with the
6 subpoena and then we could take their deposition, assuming the
7 data remain relatively the same - what's the statutory time to
8 respond to a subpoena, 20 days?

9 UNIDENTIFIED: 20, thirty days.

10 MR. RUDMAN: I mean I think we're talking about a
11 month, a month and a half so--

12 THE COURT: All right. Let me hear from the
13 opposition.

14 MR. CAPPUCCI: Thank you, your Honor. There's a lot
15 to respond to.

16 First of all, just to clear up the record, the
17 document that the Court was referring to which had the August
18 16th date was not a document that we had in our possession.
19 This is a document for, and I'm sorry I didn't bring this up,
20 this is a document which was in the possession of the clearing
21 firm. So they have generated it on that date. We didn't have
22 it.

23 THE COURT: And when did you receive it?

24 MR. CAPPUCCI: I am not sure about the precise date,
25 but I would assume it was very close to the date upon which we

1 produced it. And let me just read the letter, again from the
2 clearing firm. I mean unless Mr. Rudman is saying that he
3 doesn't accept our representation as counsel, I don't think he
4 intends to infer that, but the letter is dated September 20,
5 2005 from Merrill Lynch Pax division. It is addressed to our
6 firm and it talks about an extensive search that they did for
7 the records, your Honor, at our direction because we understood
8 his position and rather than rely on our internal
9 documentation, the best source of that data is the clearing
10 firm and that's why he wants to serve a subpoena on the
11 clearing firm. It's all here, your Honor. He has everything.
12 If your Honor wants to authorize the service of subpoena so be
13 it, but frankly there's a representation by counsel that he has
14 all the documents and it's a complete waste of time to go down
15 that path as well as it would just delay the proceedings. So
16 that responds to that, your Honor.

17 We are missing, missing, missing the point here.
18 Mr. Rudman is a skillful lawyer. I've worked with him on many
19 cases but what he has done is he's created an absolute
20 distraction in a satellite process, which is taking us away
21 from what is really the case. This case was brought first by
22 the filing of three separate complaints. The plaintiffs in
23 those cases and those are the Brown action, the Lobel action
24 and the Grill action, the only three complaints filed, none of
25 which was filed by his firm, they were filed on behalf of

1 plaintiffs who solely purchased common stock. Those cases
2 were brought to represent persons who acquired Biogen
3 Securities, and I am delighted to hear today, I am to hear that
4 Mr. Rudman no longer takes the position that an option is the
5 security of the company. I'm delighted that he has accepted
6 that and there's no question about that in the record.

7 THE COURT: Some dot on his face.

8 MR. CAPPUCCI: Okay, but he has to, your Honor, it's
9 a given fact. Mr. Rudman's client, the London Pension Fund,
10 has no options transactions. It may not assert claims on
11 behalf of options purchasers, sellers what have you. They will
12 never be part of this case. This case will be as it's been
13 brought from the outset in behalf of purchasers of the
14 securities of Biogen. It will never include options.

15 What is he trying to do? He is trying to point to
16 our options trading which I admit existed but I still submit
17 was limited, using that activity outside this case which we and
18 no other plaintiff will recover for in this case, to diminish
19 our financial interest--

20 THE COURT: I can hear you.

21 MR. CAPPUCCI: I'm sorry. I apologize. In the very
22 litigation it is a non-sequitur, it is illogical, it is not
23 appropriate. Now, what else does he admit? He admits,
24 absolutely admits that on the common stock that we purchased
25 and held throughout the end of the class period, your Honor,

1 182,000 shares compared to his 84,000 shares, he admits that
2 we, that our group held those shares throughout and he admits
3 all the damages on those common shares. Admitted, not in any
4 way challenged. And on the basis of the common stock that's in
5 the case, the common stock that's the subject of this
6 litigation our losses are 4.8 million and his are 3.7. We get
7 the presumption. We should be afforded the leadership of the
8 case.

9 Now, what else does he admit? Our group consists of
10 the New Jersey Carpenters Pension Fund, the Carpenters Annuity
11 Fund, the Folksam Asset Management and Deerfield Beach and the
12 Plumbers and Pipefitters. He has absolutely nothing to say
13 about those clients. He doesn't challenge their adequacy. He
14 doesn't challenge their standing. He makes no mention of them.
15 So in the most remote of scenarios where there was an issue at
16 class certification we have other class representatives who
17 would remedy in protective class. Not to say that would
18 happen, but just so that the record is clear, he's only
19 challenging two members of our group. Okay.

20 The Court was correct when it pointed to the fact
21 that this has to be an expeditious process. This is not an
22 unlimited fishing expedition. And Mr. Rudman skillfully, and I
23 think the Court in its desire to achieve fairness and reach the
24 right decision has allowed him to go on this frolicking detour
25 into our options trading. The fact of the matter is, your

1 Honor, everything Mr. Rudman said is unfounded. It is not
2 supported by expert affidavit. He has no expert in court to
3 testify as to that. That is his opinion, his opinion, on our
4 trading. Unlike, and for the record as a matter of evidence,
5 we have submitted the Kevin Dages' affidavit. Your Honor, can
6 I just hand you please a book which includes things that are in
7 the record which may help the situation if I could just do
8 that?

9 THE COURT: Do you have a copy for your--

10 MR. CAPPUCCI: Yeah, we have a book for the Court.
11 I'm not saying I'm definitely going to get to it. I'd like
12 to--

13 THE COURT: Do you have a copy for your brother?

14 MR. CAPPUCCI: I've already given it to my brother.

15 THE COURT: All right. Fine.

16 MR. CAPPUCCI: Here.

17 THE COURT: To be marked as your Exhibit A for this
18 hearing.

19 MR. CAPPUCCI: Thank you, your Honor.

20 MR. MATULE: Your Honor, are defendants entitled to a
21 copy too?

22 MR. CAPPUCCI: Yes, yes.

23 THE COURT: Certainly.

24 MR. CAPPUCCI: I'm sorry, I neglected to send it to
25 my good friends over at Skadden Arps.

1 MR. MATULE: Thank you.

2 MR. CAPPUCCI: Who are by the way, your Honor,
3 licking their chops as the plaintiffs proceed here. And that's
4 another point.

5 THE COURT: Biogen Exhibit A.

6 (Biogen Exhibit A, admitted)

7 MR. CAPPUCCI: As I wrote in my various letters to
8 Mr. Rudman extensive discovery in the lead plaintiff stage on
9 merits issues is not in the best interest of the plaintiff
10 class. I understand that. He's approaching limited issues,
11 but we all have to be mindful of the fact that they're sitting
12 and waiting back here watching our every move.

13 Your Honor, I also point out and I'm going to address
14 Noel Smith who is a principal of Third Millennium, he's in from
15 Chicago and he's delighted to be here and has assured us and
16 will assure the Court that his firm is committed if appointed
17 as a lead plaintiff to be monitoring this litigation and
18 directing the skillful work of counsel. And let me just say
19 another thing, I think that in these cases it is important to
20 have intelligent, sophisticated institutions who understand the
21 market because that can help the case. That helps the damage
22 claim. That helps the allegation about inflation per share,
23 about what the effect is on non-disclosure. These are market
24 professionals. They add tremendous, tremendous assets to the
25 prosecution of the case. That's the sophisticated view. The

1 narrow view just says they have some options trades, oh, maybe
2 they trade derivatives, maybe they do this, maybe they do that,
3 that's not the intelligent approach here. One has to look at
4 the total picture. And I would say and I would hope this would
5 not be disputed that folks like this add a lot of talent and
6 can help the prosecution of the case in a very smart way.

7 Mr. Noel Smith also possesses some highly impressive
8 skills and degrees undergraduate. He was studying to be a
9 neurosurgeon, I believe, so he has a medical background as well
10 which would add to this. But my sole point really is that
11 intelligent, skillful people in the driver's seat always helps
12 the case.

13 Another very big point, London Pension Fund
14 Authority, we know them well, they're the newest player, the
15 newest client of the Lerach firm which I guess we'll be seeing
16 in these cases. Mr. Rudman has said nothing about his client.
17 What does his client do? How does his client buy and sell
18 stock? He would have you think that his client is like a widow
19 and orphan. That it buys a couple of shares here. It sells a
20 couple of shares here. It does nothing special. It's not
21 unique or atypical. It's not overly sophisticated. It is so
22 vanilla. It is a purebred. It is the best lead plaintiff you
23 would want. That is such a mischaracterization of who they
24 are.

25 Your Honor, we didn't think we would have to go down

1 this road and this is not said in any disparaging way, but
2 again I make these points as I'll get to just point out that
3 when you're dealing with institutional plaintiffs that are
4 managing a lot of money they all do the same thing. They all
5 trade options. They all trade futures. In their own quarterly
6 reports and their investment reports they admit, they admit
7 that the fund is authorized to trade futures and options. They
8 do the same thing, but let's not get into that because I don't
9 want to enter the speculative phase.

10 Their funds are what we call index based. I don't
11 know if the Court has had an opportunity maybe in the sense of
12 the judicial pension funds that is something that we deal with,
13 but let me just explain what happens with an index fund.

14 THE COURT: I've had other securities cases so--

15 MR. CAPPUCCI: Okay.

16 THE COURT: -- you know.

17 MR. CAPPUCCI: The fact of the matter is, is that we
18 have determined, and this is in Kevin Dages' affidavit which is
19 the first exhibit, we have determined just to sort of show you
20 what happens on their side, that their large purchase of 31,000
21 shares on September 30th of last year, their 31,000 share
22 purchase, why was it executed, because they were rebalancing
23 their index portfolio. It's in the record, your Honor, it's in
24 the Kevin Dages' affidavit, this large transaction right smack
25 in the middle of the class period one of their biggest trades

1 they bought it for no reason having anything to do with
2 Biogen. They bought it because Biogen at that time had a
3 certain place in an overall S&P index, which is affected by
4 thousands of items. It's affected by performance of all the
5 other companies in the index and has nothing to do with the
6 merits of the investment. That's typical? That's not, you
7 know, different? He didn't tell you about that. He didn't
8 want to say anything about his index trading because it makes
9 him look like us. It makes him sound sophisticated and
10 different. Okay. But Congress wanted the institutions. They
11 wanted clients like his and they wanted clients like ours.
12 They wanted to bring this intelligence to the marketplace, but
13 the fact of the matter is, is that they're no different.
14 They're no different.

15 Now unlike supposition, hypothetical guesswork, Kevin
16 Dages, a principal of Chicago Partners - I don't know if the
17 Court has had experience as a practitioner with that firm, they
18 are clearly one of the most preeminent firms in the damage
19 analysis study. They testify as to evaluations mostly for
20 defendants. The plaintiffs' bar started using them because
21 they were so effective on the other side. Kevin Dages being a
22 student of the Chicago School of Economics, very, very skilled.
23 We gave them all the data. We gave them all the paperwork. We
24 gave them the options trades and we said look at all of this
25 and let us know what you found. Well, here's what they found.

1 First point, they found that with respect to Third Millennium,
2 and we had them focus on Third Millennium that the trading
3 pattern in the common stock, the volume of shares that we
4 bought, the timing, the aspects of the trading, the prices that
5 we paid resembled the same pattern of the top 25 institutions
6 that are in that stock. Chicago Partners concluded that our
7 trading pattern was virtually if not identical, was in the same
8 pattern of trading as the top 25 holders. Now, it also
9 recognized that the top 25 institutions, which owned most of
10 the stock, are regular traders. They trade quite actively and
11 sometimes they disguise their trading, sometimes they bungle
12 their trades, but when putting our clients grouping with the
13 top 25 institutions it was analogous. And, your Honor, I'll
14 spare the Court with going through the details of each and
15 every point, but let's just say that it is un-refuted. That
16 affidavit basically concludes that we are similar and typical
17 to all the other institutions, the top institutions trading the
18 stock.

19 What else does it say? It says that institutions
20 also trade options. It's not a mystery. They do. And for
21 that matter we're no different than anyone else. We had a
22 conservative strategy to in some way hedge our common stock
23 position but, A) it's not part of the case and, B) even if the
24 Court looked at it and it was appropriate to look at it that
25 number is only \$300,000 and some change. My view as I said to

1 the Court at the last hearing was that that was not a major
2 distraction or offset for all the losses in excess of \$3
3 million. Chicago Partners concluded that based upon its review
4 of the evidence we had the largest financial interest in the
5 case. We were entitled to the presumption. We were entitled
6 to the presumption and on the record that is presented it has
7 absolutely not been refuted.

8 A little bit more about our client. Yes, as
9 Mr. Rudman pointed out, member of the NASD. Yes, as Mr. Rudman
10 pointed out, licensed by the Securities Exchange Commission and
11 supervised by the Securities Exchange Commission, not a fly by
12 night outfit, member of the Chicago Board of Exchange and the
13 Mercantile Exchange, he has pointed to a single violation or
14 problem that this firm has had since its long years in
15 existence, not suggesting any issue or problem or taint on
16 their reputation so as to deprive them their right to lead this
17 litigation. Your Honor, I can sit here, I can refute his
18 analysis of the options. We absolutely disagree with his
19 mismatching and hypothetical. We stand on the Dages'
20 assessment of our profit and loss on the options. And I know
21 my client was chuckling here when he heard Mr. Rudman speak
22 about how much money they made or could have made on these
23 positions. It simply didn't happen. It didn't happen.

24 Let me just conclude, and again the points about just
25 to go back, the points about the London Pension Funds having

1 all the index trading and that is all in the record under the
2 Dages' affidavit, your Honor, if your Honor wants to refer to
3 that but it's fully on the record, but let me just refer to one
4 other thing which is another valuable point to this process
5 which has not been addressed. The Milberg Weiss firm and our
6 firm are lead counsel in the, I'm not going to say companion
7 Elon case but the related Elon case which was filed in this
8 district. And Judge Tauro appointed us lead counsel in that
9 case to lead the prosecution.

10 There are great efficiencies under Rule 23(g) to
11 having this team of lawyers prosecute this case as well. It
12 will save the class costs and expense. It will save the class
13 fees at the end of the day because this will be a coordinated
14 prosecution. There is absolutely no conflict. But there are
15 clear efficiencies that I believe that the desires of the new
16 amendment to Rule 23 clearly require the Court to look behind
17 the scenes to see what else counsel could bring. We believe
18 that we're way ahead, way ahead of the game in terms of our
19 investigation. That case has already - well in process, ahead
20 of this case and we believe that we can add tremendous,
21 tremendous benefits to the class through a coordinated
22 litigation.

23 THE COURT: What's your response to that argument?

24 MR. RUDMAN: My response to that is that's not the
25 test under the PSLRA. The test is who has the largest

1 financial interest, who's otherwise adequate and typical. I
2 don't think Mr. Cappucci or the Milberg Weiss firm who I was
3 partners with not too long ago would have any doubt that I or
4 the people in my office couldn't competently handle this case.
5 or prepare an amended complaint or defend a motion to dismiss
6 any different than them. I understand that sure you could
7 point to it and say that there are efficiencies in two people
8 running the same case. The same person could look at that and
9 say there is a potential conflict down the road if the
10 discovery doesn't turn out the way they anticipate it now or if
11 there's some issue as to funds or insurance policies or
12 defenses and the like. So one might say that representing both
13 classes presented a conflict issue. But certainly I can't
14 argue with the commonsense notion that two people - that the
15 firm litigating one case on the same set of facts against
16 another company there wouldn't be some efficiencies but that's
17 not the test. That's not what's required.

18 THE COURT: All right.

19 MR. RUDMAN: And nobody moved against them in the
20 Elon case.

21 MR. CAPPUCCI: Just so the record is clear, your
22 Honor, that was a June 6, 2005 order by Judge Tauro appointing
23 us as lead.

24 Lastly, again in the record is the affidavit of Neil
25 Kazaross one of the other principals of the firm who testifies

1 unequivocally that in purchasing the Biogen securities they
2 relied at all times on the market price, taking the benefit of
3 the efficiency of the market, doing fundamental analysis.
4 That's what these folks do. They're smart. They look at all
5 the information and they were defrauded just like London
6 Pension Fund as a result of the disclosure with respect to
7 Desabre, the MS product that is being marketed or was marketed
8 by the defendant.

9 So I'm here to answer any questions clear - if the
10 Court has any questions for our client he is available. We
11 would like to see this process concluded as I'm sure the Court
12 would. I think that the request again for the Pax is a waste
13 of time and Mr. Rudman with all do respect should have
14 proceeded with that examine on Tuesday. I'm sorry, he didn't,
15 he didn't and that should be the end of the inquiry. Thank you
16 very much, your Honor.

17 THE COURT: All right.

18 MR. DUMAIN: May I have a moment, your Honor?

19 THE COURT: You may.

20 MR. DUMAIN: Thank you. Sanford Dumain from Milberg
21 Weiss. I will be brief and I just want to emphasize one or two
22 of the things that Mr. Cappucci said. The process here is such
23 that Congress wanted the opportunity to challenge a lead
24 plaintiff applicant. But what happened in this case, your
25 Honor, since the Biogen Investor Group had the largest loss and

1 was presumptively the lead plaintiff, the focus as Mr.
2 Cappucci said has been very skillfully placed on Third
3 Millennium and Horatio, two of the six members of our group.
4 There has been no discussion of London, and the reason that's
5 important, your Honor, is that the only reason why London and
6 Mr. Rudman are saying that Third Millennium is atypical is
7 because it did sophisticated things. And the only reason it is
8 able to do that is because it has been able to focus on this
9 group because we had the larger loss. That doesn't mean that
10 it defaults to London. For sure if your Honor were to accept
11 all of
12 Mr. Rudman's arguments, say that Third Millennium's not
13 adequate, say that Horatio is not adequate, therefore, their
14 group is bigger and appoint them lead plaintiff and in lead
15 counsel for sure come class certification time, the defendants
16 would be doing everything with respect to their clients that
17 they're doing to our clients. It just hasn't happened in this
18 process because they've taken the position in letters to
19 Mr. Cappucci that because this group, the Biogen Institutional
20 Investor Group is presumptively the best most adequate
21 plaintiff, that's where the discovery needs to be focused. And
22 that's one of the great leaps that Mr. Rudman is asking this
23 Court to make. Don't look at London at all, just assume that
24 we're fine because they're not. What the fact is as Mr.
25 Cappucci explained London is as sophisticated an investor as

1 are our clients. One of the things that makes them all
2 typical is that they all relied on the integrity of the market
3 at price of the stock. When our clients were buying the stock
4 they thought it was being fairly priced. When their clients
5 were buying the stock they thought it was being fairly priced.
6 And that's true for the whole class. What Congress did in
7 setting up this procedure and allowing very limited discovery
8 of proposed lead plaintiffs was to ensure that you didn't have
9 a lead plaintiff that truly had a disqualifying interest such
10 as inside information, such as a very close relationship with
11 the defendants. We don't have any of that here. All we have
12 here is the undisputed fact that we have sophisticated clients
13 on both sides fighting for this leadership fight. And when you
14 have a situation like that, Mr. Rudman's request that you knock
15 us out and just accept him just doesn't work. That's not what
16 Congress envisioned here at all. All we have is a situation
17 where we have the most presumptive losses here. Mr. Rudman
18 hasn't shown anything that should knock us out on those
19 grounds.

20 Now, Congress was very careful to set up a specific
21 statutory scheme for how lead plaintiffs were appointed. If
22 Mr. Rudman is right, which we obviously emphatically deny and
23 come class certification time we will fight vigorously, if Mr.
24 Rudman is right and Skadden very skillfully convinces the Court
25 at the time of class certification that everything he said was

1 right, Third Millennium is too sophisticated, there are four
2 other members of the group who can be certified as class
3 representatives who are institutions, who aren't being
4 challenged at all who are perfectly adequate class
5 representatives. It doesn't mean that it defaults to London.
6 A group is before your Honor seeking to be appointed lead
7 plaintiff and there is no reason not to so appoint. Thank you,
8 your Honor.

9 THE COURT: All right, anyone else?

10 MR. RUDMAN: Your Honor, may I briefly--

11 THE COURT: Very briefly.

12 MR. RUDMAN: I will be very, very brief. I do want
13 to say one thing. First of all, we didn't create the process,
14 Congress did. The process is who has the largest financial
15 interest. That group gets the presumption. That can then be
16 challenged in discovery if a reasonable basis is brought that
17 was brought by the other movant. That was the Court's holding
18 the last time we were here. We have a reasonable basis. For
19 them to say, well, London hasn't said anything, well, we don't
20 have the presumption. Not only that, we had a briefing on the
21 lead plaintiff motion. They had an opposition brief and a
22 reply brief. In neither of those briefs were there any, at
23 least as I understood it, any serious facts marshaled to show
24 there was any problems with our clients. In fact, the position
25 in those briefs were that they had a bigger loss than us and

1 everything with their clients was okay. So the notion that
2 this is a one sided process and we're skillfully doing
3 something or focusing on them, well, you decided, the Court
4 held they had the presumption and we're entitled to discovery
5 and that's what the statute says. If they had some problem
6 with their clients they could have discussed it in their
7 papers. They didn't do that. To bring it up now when we've
8 raised what we think are serious issues is improper. This has
9 never been a fishing expedition. Their website says that they
10 traded options. We're vigorously representing our clients in
11 the interest of the class in determining if they had that
12 options trade and it plays out. We weren't fishing. We
13 weren't casting a wide net in searching for things. We said
14 since the first day they traded options. It turns out they did
15 and that they were engaged in very complex strategies. The
16 Dages' affidavit is interesting in what it doesn't say. It
17 doesn't mention any options trading strategies they're engaged
18 in. It also doesn't say they got all the options data. It
19 says they reviewed the data on their certifications and put it
20 into a spreadsheet. At paragraph 30 it says it's been told by
21 Third Millennium that its profits on options trading was only
22 300,000. Interestingly they don't say we reviewed the options
23 data. We crunched it. We took a look at it. There's no
24 inadequate, there's no trading patterns here. It was just
25 simple trading of options. There's nothing in that affidavit

1 about that.

2 Although I don't think I have to I'm going to
3 respond. An index fund--

4 THE COURT: Briefly.

5 MR. RUDMAN: Briefly. Well, Mr. Dumain, an index
6 fund inadequate, atypical? Everyone buys stock in an index
7 fund or indexes their stock purchases. That, your Honor, is
8 just like everybody else. Engaging in five part options
9 transactions where you're going to make money if the stock goes
10 down isn't, and by the way I didn't hear Mr. Cappucci or
11 Mr. Dumain have anything to say about those charts or anything
12 to say about their adequacy and typicality if they were betting
13 the stock was going to go down during the class period. I
14 think we can all agree that the average investor who is buying
15 the stock wasn't betting it was going to go down.

16 And finally, if the Court wants to look at what other
17 courts have done when faced with similar situations, I
18 respectfully refer the Court to our brief in *Micro Strategy*, in
19 *Bank One*, in *Seaman's Auto*, in *Williams Communications*, and all
20 the other cases we cite courts have looked to the very
21 provisions we're relying on here and knocked out lead plaintiff
22 movants.

23 And lastly, doesn't - the group rises or falls on
24 Third Millennium or Horatio because without them the financial
25 interest of our clients is far greater than theirs. And the

1 notion you can ride into a major multi billion dollar
2 securities case on a car with a broken engine the expectation
3 that somebody else is going to come and fix it later is not
4 what was intended by the PSLRA.

5 THE COURT: All right. Well, I'll take it under
6 advisement. I'll give you a prompt ruling. But I think while
7 you are here I want to hear about discovery and a proposed
8 schedule.

9 MR. RUDMAN: You mean with respect to the Pax and--

10 THE COURT: No, I mean about everything. I mean the
11 case in general.

12 MR. RUDMAN: Oh, you mean setting a schedule, you
13 mean with the defendants?

14 MR. MATULE: Your Honor--

15 MR. RUDMAN: You're talking about the filing of an
16 amended complaint, that kind of scheduling, your Honor?

17 THE COURT: Exactly. Exactly.

18 MR. RUDMAN: Okay.

19 MR. MATULE: Your Honor, Matthew Matule on behalf of
20 the defendants. We've been an interested, albeit much of a
21 bystander, in these proceedings pursuant to the Greeble and the
22 other decisions in the First Circuit and we're awaiting the
23 conclusion of the lead plaintiffs, lead counsel motions so that
24 we actually know who we are going to be up against in this
25 matter. We do not have an operative complaint. It won't be

1 until sometime I assume after lead plaintiffs and their
2 counsel are selected. We will most definitely be moving to
3 dismiss that amended complaint if and when it does get filed
4 and pursuant to the PSLRA all discovery as to the merits or
5 classification are stayed pending--

6 THE COURT: Right.

7 MR. MATULE: -- that motion so.

8 THE COURT: But I want some sense of if it does go
9 forward, you know, what kind of a discovery period are we
10 looking at? I want to get some sense of what I might be
11 dealing with.

12 MR. CAPPUCCI: Your Honor, could I just answer this
13 because again we are somewhat ahead in the Elon case. We would
14 need 30 days to prepare a complaint, consolidated amended
15 complaint. It's a one-year class period. It's a relatively
16 simple case. We have all the financial pharmacology and all
17 the medical research already done. There are insider trading
18 allegations in the case and they would have to be brought
19 forward. But typically the defendants would move, we would
20 actually move for a lifting of the stay of discovery in this
21 case based upon the merits.

22 THE COURT: Well, that's why I'm thinking ahead and--

23 MR. CAPPUCCI: That is what should be expected. We
24 would move for a lifting of the stay. That would be one of the
25 motions that the Court would face. They of course would oppose

1 that and they would be filing their motion to dismiss promptly
2 probably within 30 or 45 days from the filing of our complaint.
3 Not a terribly complex case. Assuming that the complaint is
4 sustained which we are confident it will happen, this is a case
5 which is in no way in need of more than 15 depositions per
6 side. We would of course probably ask for more but this is a
7 case which I think can be prosecuted very efficient--

8 THE COURT: Don't count on getting it.

9 MR. CAPPUCCI: Yeah, I understand that.

10 THE COURT: Without a very strong showing.

11 MR. CAPPUCCI: I understand that but--

12 THE COURT: I tend to try and keep discovery on a
13 short leash.

14 MR. CAPPUCCI: I understand that and that's why I use
15 the number 15. We have cases where we've taken a hundred
16 depositions in a case but that's not this case. But that's
17 along the lines of what we would propose to the Court and how
18 fast we would be in a position to move.

19 MR. RUDMAN: Your Honor--

20 MR. CAPPUCCI: As you can see there's a lot - go
21 ahead.

22 MR. RUDMAN: -- if I might make a suggestion. Do you
23 want us to recess for a minute, the three of us could talk with
24 the defendants and come up with some kind of proposal.

25 THE COURT: Always helpful.

1 MR. MATULE: I do agree that it would be helpful. I
2 don't know if on a short recess we'd be able to--

3 MR. RUDMAN: Do you want us to submit something in a
4 day or two?

5 MR. MATULE: -- address.

6 THE COURT: Well, you can submit something.

7 MR. MATULE: -- because--

8 MR. RUDMAN: Why don't the three of us just circulate
9 something. We obviously don't know yet until we hear from the
10 Court as to who's going to be running the case, but we
11 certainly can all discuss an appropriate schedule and try and
12 put together a--

13 THE COURT: As a proposed what you think is
14 reasonable.

15 MR. MATULE: We can certainly work together to try
16 and present something to the Court that would either be agreed
17 upon or at least would should the competing visions of how the
18 case should proceed, the interests being the grounds for any
19 motion for lifting the statutory--

20 THE COURT: Yeah, of course.

21 MR. MATULE: -- stay of discovery.

22 THE COURT: Of course.

23 MR. MATULE: We would also submit to the Court that
24 in light of a lot of the issues that were raised in these
25 proceedings that it would be beneficial to bifurcate and

1 address. Plus if in fact any complaint that does get filed
2 gets past the motion to dismiss stage there would be class
3 certification proceedings and we would submit that the only
4 discovery that should take place after and if a motion to
5 dismiss is denied would be limited to class certification
6 issues to see if any such case is certifiable as a class. And
7 only after that gets resolved we could get to any discovery on
8 the merits of the case so--

9 THE COURT: And I have it for dispositive motions so
10 I would be doing those.

11 MR. CAPPUCCI:: Your Honor, just that last statement
12 about staying merit discovery permitting class discovery we
13 would so strenuously oppose that application as you noticed.

14 THE COURT: I knew that.

15 MR. RUDMAN: Yeah.

16 MR. CAPPUCCI: Okay. I mean I'm sort of salivating
17 after hearing it, but--

18 THE COURT: All right, I'll take the matter under
19 advisement. I'll try and give you a prompt ruling.

20 MR. CAPPUCCI: Thank you, your Honor.

21 MR. RUDMAN: Thank you, your Honor.

22 MR. CAPPUCCI: Thank you very much.

23 THE COURT: I probably won't write off, but we'll
24 give you something brief electronically.

25 MR. CAPPUCCI: Thank you, your Honor.

1 MR. RUDMAN: Thank you.

2 THE COURT: All right. And there is just for the
3 docket, docket entry number 50, which is motion for leave to
4 file a joint declaration, no opposition.

5 MR. RUDMAN: That's fine, your Honor.

6 THE COURT: So it would be allowed.

7 MR. CAPPUCCI: Okay. Thank you.

8 THE COURT: All right. All right, we stand in
9 recess.

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